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No. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ETTA B. SAUNDERS,

Petitioner,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December, 1980.

Questions Presented

1. Did the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964, waive the federal government's sovereign immunity from suit to enable a federal worker who proves race discrimination in employment to obtain the same cost of living adjustments to a back pay award that a private sector employee could obtain under Title VII?

Petitioner contends that the court of appeal's holding that the Act did not, conflicts with this Court's holdings in Brown v. General Services Administration, 425 U.S. 820 (1976) and Chandler v. Roudebush, 425 U.S. 840 (1976).

2. Did the Court of Appeals err in holding that petitioner was entitled to only a partial award of counsel fees because she prevailed on only one part of the case?

Parties

Etta B. Saunders, Petitioner.

William Graham Claytor, Jr.,
Secretary of the Navy;
Warren Sells; Alameda Naval Air
Station; J. M. Wolff; Naval Air
Rework Facility, Alameda, Calif.,
Respondents

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October Term, 1980

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ETTA B. SAUNDERS,

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Secretary of the Navy, et al.,

Respondents.

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Petition for A Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

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The petitioner, Etta B. Saunders, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth District entered in this proceeding on October 3, 1980. The opinion of the Court of Appeals is reported at 629 F.2d 596 and is set out in the Appendix hereto

at pages 1a-11a. The opinion of the District Court of July 11, 1978 is unreported and is set out in the Appendix hereto at pages 12a-31a. The orders of the District court dated Oct. 31, 1978, Dec. 12, 1978, Jan. 25, 1979, and March 16, 1979, awarding back pay, counsel fees, and denying a new trial are unreported and are set out in the Appendix hereto at pp. 32a-36a; 37a-39a; 40a-43a; 44a-50a; and 51a-52a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 3, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 717(b),(c), and (d) of the Equal Employment Opportunity Act of 1972, amending Title VII of the 1964 Civil Rights Act, § 2000-e-16(b), (c), and (d), provide, in pertinent part:

(b) Except as otherwise provided in this subsection, the Civil Service Comission* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

* * *

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the

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*/ Under the President's Reorganization Plan No. 1, of 1978 the functions of the Civil Service Commission under § 717 were transferred to the Equal Employment Opportunity Commission as of January 1, 1979.

> initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Section 706(g) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g), provides:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor

> organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate....

Section 706(k) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Public L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, §§ 4, 11, Mar. 24, 1972, 86 Stat. 104.

Statement of the Case [1/]

These are two consolidated actions brought pursuant to 42 U.S.C. § 2000e-16(c), Title VII of the Civil Rights Act of 1964 as amended by Section 717(c) of the Equal Employment Opportunity

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1/ The facts set out herein are based on the findings of fact of the district court, which were not challenged by the government in the court of appeals.

Act of 1972. They were brought on behalf of Mrs. Etta B. Saunders, a Black woman employed by the Department of the Navy at the Naval Air Rework Facility, Naval Air Station (NARF/NAS) Alameda, California.

Mrs. Saunders was hired on a temporary appointment in November, 1966, as Aircraft Metalsmith Helper at NARF/NAS. By 1968 she had been given a Career Conditional appointment as an Aircraft Metals Worker as a Wage Grade, or industrial worker, at the WG-8 level. In late 1968 Mrs. Saunders applied for a promotion to the position of an Aircraft Metalsmith at the WG-10 level but did not receive it. In March, 1971, she filed a formal complaint of discrimination charging that she had been denied the promotion because of her sex and race (App., pp. 12a-13a).

On February 6, 1972, the Secretary of the Navy held that plaintiff had been discriminated against because of her sex and ordered that she receive appropriate relief. As a result, in 1973 she was promoted to the WG-10 level (Id., 13a-14a). In addition to filing formal and informal complaints of discrimination on her own behalf,

plaintiff represented other employees of NARF in equal employment opportunity matters and generally took an active role in attempts to promote equal employment opportunity on the base. (Id., 17a-23a). On March 19, 1973 plaintiff applied for another promotion to Equal Employment Opportunity Specialist, a General Schedule position at the GS-9 level. Four EEO Specialist positions were advertised for which 14 persons applied (Id., 14a).

On April 2, 1973, while her application for the EEO Specialist position was pending, plaintiff was notified that her employment at NARF would be terminated effective June 1, 1973, because of the abolition of 108 of the 145 WG-10 Sheet Metal Mechanics positions, as part of a Reduction in Force (RIF) (Id., 25a). One week later, on April 9, 1973, plaintiff was notified that she had been rated ineligible for the GS-9 EEO Specialist position even though, as the District Court found, she had sufficient experience in the area of EEO work to meet the qualifications established by the Civil Service Commission (Id., 17a, 19a).

Only one of the 14 applicants for the positions was found qualified, and the Navy decided to fill the remaining three GS-9 Specialist positions through an alternative selection method under which selectees were not required to meet the educational and experience standards that had been used to find Mrs. Saunders inelgible (18a, 20a). As a result all four positions were filled by men, even though plaintiff was better qualified for the positions than at least two of the men who were placed in them. Indeed, plaintiff had more EEO experience that any of the four men selected (20a, 23a-24a).

The District Court found that:

> Plaintiff was a highly visible and active symbol of equal opportunity at the NARF/NAS. She had been the first female Navy employee to prevail in a discrimination case. She had been active throughout her employment as a EEO representative for other minority and female employees (23a).

Therefore, the reasons given for not appointing her to one of the positions were pretextual, and

the real reason was to prevent her from getting the position and thereby to force her to leave the base, since her existing job had been eliminted as a result of the RIF (24a-25a).

The Court made a specific finding that the defendants' actions, "were the result of discriminatory and/or retaliatory animus", and concluded that plaintiff had been denied her rights under Title VII (25a, 30a). With regard to the RIF action itself, the court held that it had not been taken in violation of Title VII (31a). However, as noted above, the combined result of the RIF and the unlawful denial of the EEO position was to force plaintiff out of her employment and thereby to get rid of her (24a-25a).

Because of the administrative procedures for processing complaints of discrimination in effect in 1973, plaintiff filed separate complaints regarding the two actions. The processing of the complaints finished at different times and because of the 30-day time period for filing a Title VII action against a federal agency, she filed two separate complaints in federal court (17a-18a; 27a-28a).

The complaints were consolidated for all purposes and a single trial was held in 1978. At the end of the trial the District Court held, as described above, that the denial of the promotion was a deliberate act of discrimination and reprisal and that although the RIF itself was nondiscriminatory, the net result was that plaintiff lost all employment. The Court further found that plaintiff had made every effort to obtain a job but was unable to do so. Therefore, she remained unemployed from 1973 until 1979 when she was reinstated pursuant to the Court's order.

The court ordered her retroactively appointed to an EEO specialist postion at the GS-7 level with promotions to the GS-9 and GS-11 levels as of 1974 and 1975. From the base amount of back pay which plaintiff would have received from 1973 to 1979 if she had not been denied the promotion was deducted the severance pay and unemployment insurance benefits she did receive.[2/]. Plaintiff

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2/ The base amount was $92,955.92, from which was subtracted $4,619.11 in severance pay and $1,620.00 in unemployment benefits.

was also credited with the amount of sick leave and annual leave which had accumulated at the time of her termination in 1973 (33a-36a).

After the calculation of the net back pay the court determined that it would be adjusted by an inflation factor calculated according to United States Department of Labor cost of living data to compensate her in constant dollars to make her whole for the injury suffered by the discrimination,[3/] for a total award of $102,948.52. The court denied any award of interest, and plaintiff did not appeal from this ruling. In a subsequent order the District Court determined that a reasonable amount of counsel fees and costs would be $69,015.00 (44a-50a).

The United States did not appeal from the decision on the merits, but did appeal the amount awarded as back pay, arguing that the cost of living adjustment used in calculating the award was the same as an award of interest. Interest

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3/ The necessary adjustment was calculated to be $16,231.72. The government has not disputed the accuracy of the amount.

was barred by sovereign immunity, the government urged, since Title VII did not expressly provide for awards of interest against the government. The defendant also appealed from the counsel fee award, arguing that no fees should have been granted for the work done on the Reduction in Force claim because plaintiff had not prevailed on it within the meaning of 42 U.S.C. §2000e-5(k).

The Court of Appeals ruled in the government's favor on both issues, holding not only that federal government employees could not recover interest, but that, because of sovereign immunity they could not be given any remedy other than back pay to which private employees were entitled because those remedies were not enumerated in the statute.

> The doctrine of sovereign immunity dictates that the United States cannot be sued without its consent. The 1972 amendments to Title VII authorize the remedy of back pay for employees of the United States government who are victims of discrimination. See 42 U.S.C. § 2000e-5(g). Although many additional remedies, such as interest on back pay awards, vacation and sick pay adjustments are available to private employees, these remedies are not available to employees of the government because neither the 1972 amendments nor the incorporated provisions of Title VII expressly authorizes them.

629 F.2d 596, 598; Appendix , pp. 6a-7a. Taking into account cost of living increases in calculating back pay, it was held, was the same as prejudgment interest.

With regard to attorneys' fees the Court held that since the plaintiff had not prevailed on the RIF claim as such, she was not entitled to an award of fees with regard to any time expended on that aspect of the litigation. The Court of Appeals therefore reversed the decision of the district court as to both issues raised by the government.

Reasons for Granting the Writ

I.

THE DECISION OF THE COURT BELOW RAISES IMPORTANT QUESTIONS CONCERNING CONGRESSIONAL INTENT WHEN TITLE VII WAS MADE APPLICABLE TO THE FEDERAL GOVERNMENT AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN CHANDLER v. ROUDEBUSH and BROWN v. GENERAL SERVICES ADMINISTRATION.

A. Importance of the Issue

This case is the latest in a series dealing with the important question of the rights of and

remedies available to employees of the federal government who have suffered unlawful discrimination because of their race or sex. See, Brown v. General Services Administration, 425 U.S. 820 (1976); Chandler v. Roudebush, 425 U.S. 840 (1976); Davis v. Passman, 442 U.S. 228 (1979). The common issue is Congress' intent when it enacted § 717 of the Equal Employment Opportunity Act of 1972. Its resolution will affect the rights of millions of federal employees for whose benefit the statute was enacted.

When Congress enacted the Civil Rights Act of 1964 it excluded the United States from the definition of employer in section 701(b) (42 U.S.C. § 2000e(b). The section did, however, provide that the policy of the federal government was to make its employment decisions free of discrimination, and gave the President broad authority to implement that policy.[4/] As a result, the United

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4/ 78 Stat. 254 (1964); 5 U.S.C. § 7151, 80 Stat. 523 (1966); see, Morton v. Mancari, 417 U.S. 535, 546 (1974).

States Civil Service Commission was given administrative authority to enforce non-discrimination throughout federal employment by executive orders.

By 1971, however, there was great dissatisfaction with the Commission's record in carrying out its duties. A central problem resulted from questions as to the Commission's authority to require the full remedies, particularly back pay, necessary to carry out its mandate. The Commission's staff testified before Congress that the Comptroller General had ruled that in the absence of statutory authority the Commission could not order payment of back pay to federal employees where there had been a denial of a promotion, as opposed to a discharge.[5/] Cf., United States v. Testan, 424 U.S. 392 (1976).

Congress was further concerned whether sovereign immunity precluded any judicial remedy

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5/ Testimony of Irving Kator, Assistant Executive Director, United States Civil Service Commission, Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor, House of Representative, on H.R. 1746, Washington, D.C., March 3, 4, 18, 1971, at p. 365.

for federal government employment discrimination in light of decisions such as Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969). See, Brown v. General Services Administration, 425 U.S. at 826-828. Finally, Congress had the overall concern that federal employees did not have the same rights and remedies available to them as did all other employees faced with discrimination. Chandler v. Roudebush, 425 U.S. at 841.

Following the enactment of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-16), the federal government strenuously argued its employees were not entitled to the same procedural and substantive rights as were all other employees. The central issues concerned the rights to a trial de novo and to maintain class actions. These arguments were seemingly laid to rest by this Court's decision in Chandler v. Roudebush, supra, which held that the basic purpose of the 1972 Amendments was to grant to federal employees the same rights as those enjoyed by all other employees, and specifically held that they were entitled to the same trial de novo as other employees were under Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Following Chandler, the lower federal courts held that class actions could also be maintained against federal government agencies. See, e.g., Eastland v. T.V.A., 553 F.2d 364 (5th Cir. 1977); Williams v. T.V.A., 552 F.2d 691 (6th Cir. 1977).

Finally, on August 31, 1977, the Attorney General of the United States issued a memorandum to all United States attorneys and agency general counsel announcing that the policy of the United States would thereafter be to acquiesce in these rulings and that specifically:

> ...[t]he Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. See Copeland v. Usery, 13 EPD ¶ 11,434 (D.D.C. 1976); Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976); Sperling v. United States, 515 F.2d 465 (3d Cir. 1975). Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Govern-

ment than are applied in other cases.[6/]

After only a relatively short period, however, in the face of the directive from the Attorney General and rulings of this and other courts, government attorneys resumed making arguments that federal employeres were entitled to fewer protections than others. In particular, objections were raised in a number of cases to the awarding of interest and cost of living adjustments to back pay on the ground that such relief was barred by sovereign immunity. See, Blake v. Califano, 626 F.2d 891 (D.C. 1980); Chewning v. Schlesinger, 471 F. Supp. 767 (D.D.C. 1979); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977); de Weever v. United States, 618 F.2d 685 (10th Cir. 1980).

At no time did the government argue that such remedies were not necessary to make federal employees whole for the effects of discrimination. In

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6/ The full text of the memorandum is reported in CCH Employment Practices, ¶ 5046. It is reproduced in the appendix hereto at pp.53a-55a.

the present case, for example, the respondent did not challenge the district court's finding that the use of cost of living factor in calculating back pay was "necessary to assure compensation in 'constant dollars'" (App., p. 34a); nor did the government challenge the accuracy of the amount needed to make plaintiff whole. Indeed, for years the government has routinely asked for, and received, adjustments to back pay to compensate for the effects of inflation when it has been the plaintiff in Title VII cases. See, e.g., United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 940 (10th Cir. 1979); E.E.O.C. v. Pacific Press Publishing Assoc., ___ F. Supp. ___, 21 E.P.D. ¶ 30,522, pp. 13,829-13,830 (N.D. Calif. 1979).7/

The government has also not disputed that such relief is mandated by this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S 405 (1975). As the Court explained:

7/ The government has also successfully argued that damage awards against it for lost future wages should be discounted to take into account the effects of future inflation when it has been the defendant in Federal Tort Claims Act. United States v. English, 521 F.2d 63, 76 (9th Cir. 1975); Steckler v. United States, 549 F.2d 1372, 1377-78 (10th Cir. 1977).

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful unemployment discrimination .... Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past...."

442 U.S at 418. Specifically, where the injury is of an economic character, the Court held that:

> . . . "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Wicher v. Hoppoch, 6 Wall 94, 99 (1867).

422 U.S. at 418-19.[8/] Here, as the district court found, the plaintiff could only be made

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8/ See also, Franks v. Bowman Transportation Co., 424 U.S 747, 763-66 (1976), holding that a grant of retroactive seniority needed to make discriminatees whole was permissible even though such relief was not specifically authorized by § 2000e-5(g). Similarly, as the court below recognized, many courts have granted other kinds of relief such as vacation and sick pay and adjustments to pension rights. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974), and cases cited there at notes 155 and 156.

whole by putting her in the same position as if she had received her wages in the years they were due.

It is only because Mrs. Saunder's employer is the federal government that the full relief to which she would otherwise be clearly entitled is not forthcoming. Petitioner urges that this case presents an unusually egregious instance of the injustice that results from the government's arguments and presents a question of vital importance to all federal employees and indeed to the effective enforcement of one of the most important of the civil rights statutes.

Mrs. Saunders suffered the most invidious type of violation of Title VII, a deliberate act of discrimination and reprisal because she attempted to assert her and others' rights under the Constitution and laws of the United States to be free of unlawful discrimination. As a result of the deliberate actions of persons motivated by a desire to get rid of her as a troublemaker, she was without employment for six years. She suffered the loss of $86,716 income, but she could not be fully recompensed for her loss by paying

her that amount of money years after she had been wrongfully denied it. The District Court found (and the government has not challenged this finding) that in order to make the plaintiff whole, that is, to place her "as near as possibile" in the financial "situation [she] would have occupied if the wrong had not been committed" the back pay award must be adjusted to take into account the effect of inflation.

The injustice to Mrs. Saunders is compounded in the present case because although the government does not contest the correctness of the underlying back pay award it has not, as of the date of the filing of this petition, paid it to her. The General Accounting Office has taken the position that since the government has had an appeal pending, the judgment is not final, and has not allowed payment. Thus, in the time since the judgment was entered in her favor, the value of the award to her has decreased from $86,716 to

$74,315.61 because of inflation.[9] According to the government and the court below this loss will never be made up to her.

If the ruling below is allowed to stand, not only will Mrs. Saunders and all other federal employees who have been found to have been the victims of deliberate discrimination suffer permanent and irremediable damage, but the law itself will suffer serious injury. The District Court found that Mrs. Saunders was the victim of an act of reprisal for her seeking to enforce rights under the anti-discrimination laws. Those laws depend on individual employees being willing to come forward, file complaints, and assist others in seeking the vindication of their rights.[10] If they can be subjected to acts of reprisal that can never be fully recompensed, the only result will be an incalculably detrimental impact on the enforcement of the law.

9/ The Consumer Price Index was 217.7 in 1979 and was 253.9 in October, 1980. Therefore, the dollar had decreased in value by 85.7% in that period.

10/ See, Love v. Pullman Co., 404 U.S. 522 (1972).

For all of these reasons, the present case presents issues of the utmost importance for the continuing viability of Title VII as a remedy against discrimination by federal government agencies. As we will show, the result reached by the court below is in square conflict with the intent of Congress and with decisions of this Court.

B. Conflict with Decisions of this Court

As described in detail in Brown v. GSA, 425 U.S. at 825-828, one of the primary concerns of Congress in 1972 was whether federal employees had effective administrative and judicial remedies for employment discrimination. The Court noted that:

> it was doubtful that back pay or other compensatory relief for employment discrimination was available....

Id. at 826.

It was precisely because of arguments based on sovereign immunity that the Congressional committees concluded that even if judicial review was available, "some forms of relief were foreclosed". Thus,

> [t]he Senate Report observed: "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggreived Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt." S. Rep. No. 92-415, p. 16 (1971).

425 U.S at 827-828.[11/] Therefore, the Court concluded, Congress was fully aware that in the past sovereign immunity had been a bar to federal employees obtaining full relief.

Congress' intention that all such bars would be removed by the 1972 enactment is equally clear. With regard to the powers of the Civil Service Commission the House-Senate Conference Committee's section-by-section analysis of the Act states:

> The Civil Service Commission would be authorized to grant appropriate remedies which may

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11/ See also H. Rep. No. 92-238, p. 25 (1971), quoted at 425 U.S. at 828.

> include, but are not limited to, back pay for aggrieved applicants or employees. Any remedy needed to fully recompense the employee for his loss, both financial and professional, is considered appropriate under this subsection. (emphasis added). 12/

That the courts were to have remedial power as broad as that given to the Commission is also evident. Congress' way of reaching this result was simple; federal employee Title VII actions were to be governed by precisely those provisions that govern private employer suits. As the Senate report states:

12/ Sub. Com. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972)(hereinafter "Legislative History"), p. 1851. Similarly, the Senate Report States:

> [T]he provision in section 717(b) for applying "appropriate remedies" is intended to strengthen the enforcement powers of the Civil Service Commission by providing statutory authority and support for ordering whatever remedies or actions by Federal agencies are needed to ensure equal employment opportunity in Federal employment....

> Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under Title VII. 13/

This was ensured by specifically stating in § 717(d) (42 U.S.C. § 2000e-16(d)) that civil actions filed by federal employees were governed by the private sector sections of the Act, thus according "federal employees the same right[s]" enjoyed by all other employees. Chandler v. Roudebush, 425 U.S 840, 848 (1976).

As this Court held in Brown:

> Sections 706(f) through (k), 42 U.S.C. §§ 2000e-5(f) through 2000e-5(k) .... which are incorporated "as applicable" by

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12/ continued

> The Commission is to provide Federal agencies with necessary guidance and authority to effectuate necessary remedies in invididual cases, including the award of back pay, reinstatement or hiring, and immediate promotion where appropriate.

Legislative History at 424.

13/ Legislative History at 425.

> § 717(d), govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief.

425 U.S. at 832 (emphasis added).[14/] Section 706(g) itself is, of course, not limited in any way to back pay; to the contrary, it provides that the court may order relief, "as may be appropriate, which may include, but is not limited to, ... back pay ... or any other equitable relief as the court deems appropriate." (Emphasis added.)

As this Court noted in Franks v. Bowman Transportation Co., 424 U.S. 747, 763-64, n.21 (1976), the phrase "any other equitable relief" was added to 706(g) by Congress in the 1972 Act, which also made the section applicable to federal

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14/ As the Court explained in Chandler, the only limiting language in § 717(d), the phrase "as applicable", did no more than reflect "the inapplicability of provisions in §§ 706(f) through (k) detailing the enforcement responsibilities of the EEOC and the Attorney general", (425 U.S at 847) and did not in any way limit the rights available to federal employees in court.

agencies, to confirm the courts' power to effect complete restitution, "making whole insofar as possible the victims of racial discrimination." 424 U.S. at 764.

Here, of course, the district court found that a cost of living adjustment in the back pay award was both appropriate and necessary to afford complete relief, and neither the government nor the court of appeals has contested that conclusion. Instead they have decided that it may not be awarded to Mrs. Saunders solely because she is employed by a federal agency. Her position is simple; section 717 was intended to be a complete and total waiver of sovereign immunity so that a federal agency is on precisely the same footing as any other employer. The decision below holding otherwise is contrary to the plain meaning of the statute, clear congressional intent, and the decisions of this Court, none of which are even cited, let alone discussed, in its opinion.[15/]

15/ Indeed, none of the decisions of the courts of appeals ruling on the issues of cost of living or interest awards even mention Albemarle, Franks,

This Court should grant certiorari to resolve these conflicts and decide the important issues presented by this case.

II.

THE DECISION BELOW ON COUNSEL FEES CONFLICTS WITH CLEARLY STATED CONGRESSIONAL INTENT AS TO THE STANDARDS GOVERNING IN SUCH CASES, AND PRESENTS AN ISSUE AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

The counsel fees issue presented by this case is an important and recurring one which has resulted in a division between the circuits: to what extent should a prevailing plaintiff's counsel fees be reduced if he or she has not prevailed in all aspects of the litigation?

In civil rights litigation, and particularly in employment discrimination cases, issues are overlapping and intertwined. In order to rep-

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15/ continued

Brown, or Chandler, or discuss in any meaningful way the legislative history of the 1972 Act. These matters were briefed in the present case and in Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980).

resent a client adequately an attorney must explore fully every aspect of a case, develop all evidence and present it to the court. In many cases the plaintiff will not be successful with regard to every contention.

The present case is a particularly good example of such a situation. There was in fact one central issue in the case, viz., why had plaintiff lost her employment at the Naval Air Rework Facility? This came about because of the conjunction of two events that occurred within a week of each other. Ms. Saunders was informed on April 2, 1973, that she would be terminated because of a RIF, and on April 9, 1973, she was notified that she would not be considered for another position that would have allowed her to remain. Naturally, she suspected some connection between the two events, particularly in light of her prior EEO activities.

In April, 1973, of course, plaintiff had no way of knowing whether the denial of the promotion, the RIF, or both, had discriminatory motives. Therefore, she had no choice but to

challenge both actions. Because of the structure of the Civil Service Commission regulatory scheme, there were two separate administrative proceedings that ended at different times. Thus, instead of there being one lawsuit filed, plaintiff had to file two at different times. Since the two actions involved the same issue--the termination of her employment--they were consolidated and tried as one action. The interrelationship of the RIF and the promotion denial meant that counsel worked on them at the same time.

Plaintiff's suspicion that there was a relationship between the RIF and the promotion denial proved correct. The district court held that the refusal to consider her for the promotion that would have allowed her to stay was to prevent her from getting the job and thereby to force her to leave the Base as a result of the RIF.

Although the RIF itself was not the result of discrimination, it was seized upon by the discriminating officials as the way to get rid of

the plaintiff when they denied her the promotion. Thus, in every sense of the word, plaintiff prevailed on the central claim in the case--that she was forced to leave the base because of "discriminatory and/or retaliatory animus."[16/]

The interrelationship of issues in civil rights cases was recognized by Congress when it passed the Civil Rights Attorneys' Fee Act of 1976 (42 U.S.C. § 1988). Thus, the legislative history of that statute makes it clear that counsel fees awards should not be based on the proportion of the case that has been won.[17/] The Senate Report on the Act discusses the standards which should be used in determining counsel fee amounts and states:

16/ It is interesting to note that even if the district court had found the RIF, in and of itself, to be a violation of Title VII, plaintiff would have received no more relief than she did as a result of winning on her promotion claim. The RIF did not take effect until June 1, 1973, after April 30, 1973, the effective date of the promotion which she retroactively received.

17/ This Court has held that the legislative history of the 1976 act may be looked to in interpreting the parallel counsel fees provision

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. 9444 (D.C. Calif. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975).
>
> . . . . In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter," Davis, supra, Stanford Daily, supra, at 684.

S. Rep. No. 94-1011 (94th Cong. 2d Sess.), p. 6.

The quoted language from Davis relates directly to the question of proportionate fees.

> It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or

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17/ continued.

in Title VII. New York Gaslight Club, Inc v. Carey, ___ U.S. ___, 64 L.Ed.2d 723, 738 n.9 (1980). See also, Cannon v. University of Chicago, 441 U.S. 677, 686, n.7 (1979); Parker v. Califano, 561 F.2d 320, 339 (D.C. Cir. 1977).

> upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

8 EPD 9444, p. 5049. Similarly, in Stanford Daily,[18] at the page cited in the legislative history, the district court rejected the position taken by some federal courts, "that hours spent on the litigation of unsuccessful claims should be deducted from the number of hours upon which an attorneys' fee award is computed," and followed other decisions that, "adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests." 64 F.R.D. at 684.

The question of the extent to which a prevailing party's fees must be apportioned between issues won and lost has caused division among the

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18/ Aff'd 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S 547 (1978).

circuits, ranging in holdings that fees should be granted for all work reasonably done and denied only for frivolous claims (Northcross v. Bd. of Ed., 611 F.2d 624 (6th Cir. 1979)), to holding that fees may only be given for that part of the case that was won (Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)). It is a recurring and important question in civil rights litigation in general and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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December, 1980.

APPENDIX

DECISION OF THE COURT OF APPEALS,
OCT. 3, 1980

No. 79-4373

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ETTA B. SAUNDERS,

Plaintiff-Appellee,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants-Appellants.

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On Appeal from the United States District Court for the Northern District of California

OPINION

Before: ANDERSON AND ALARCON, Circuit Judges, and WILLIAMS, District Judge.*

WILLIAMS, District Judge:

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* the Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

This case presents the following questions on appeal, (1) whether the district court's award of a "cost of living inflation factor" adjustment in addition to a back pay award against the United States under Title VII is barred by the doctrine of Sovereign immunity; and (2) whether the district court erred in awarding attorneys' fees for all work performed by plaintiff's counsel in two consolidated Title VII cases even though plaintiff prevailed in only one of them.

Plaintiff Etta Saunders, a Negro female, brought two employment discrimination suits against the Secretary of the Navy and others under Title VII, 42 U.S.C. §§ 2000e et seq. In the first action (CV 73-2241 WHO), she contested her removal from employment as a result of a reduction in force (RIF). In the second action (CV 74-1286 WHO), she challenged her denial of eligibility for the position of Equal Employment Opportunity Specialist.

Plaintiff was employed at the Naval Air Rework Facility as an Aircraft Metalsmith, a position she had obtained as a result of determination by the Navy Department in 1968 that she had been denied promotion on the basis of sex

discrimination. In March of 1973, plaintiff applied for the position of Equal Employment Opportunity (EEO) Specialist but was rated ineligible for that position. At approximately the same time, she was also told that because of a reduction in force of 108 positions, her employment as Aircraft Metalsmith would be terminated.

One of plaintiff's fellow employees filed an Administrative appeal on behalf of himself, plaintiff, and the other employees affected by the RIF. Plaintiff as an individual filed an EEO complaint with the Navy Department alleging that the RIF was based on race and sex discrimination against her. The Navy Department upheld the RIF, and plaintiff then filed a complaint against the Navy in district court under Title VII.

Plaintiff also filed an EEO complaint with the Navy alleging that her ineligibility rating for the EEO Specialist position was based on race and sex discrimination. The Navy Department upheld the rating. Plaintiff later filed a second complaint under Title VII challenging the Navy's denial of her application for the position.

The two cases were consolidated and tried together. The district court held that plaintiff had not demonstrated "that she was RIFed in retaliation for having opposed alleged discriminatory employment practices and/or having filed (in 1968) a complaint against the agency" or "that she was RIFed on the grounds of her sex (female) or her race." However, the court also held that plaintiff had proven "that she ws rated ineligible for the position of EEO Specialist, GS-9, in rataliation for her opposition to unlawful employment practices and/or for having filed a complaint of unlawful (employment) discrimination against the agency" as well as "on the grounds of her sex."

On October 31, 1978, the court ordered that plaintiff be promoted to the position of EEO Specialist at the level of GS-11, the same level that she would most likely have attained had she been hired for that position on April 30, 1973. Plaintiff was awarded back pay of $92,955.92, which supposedly included amounts she would have received for promotions and appropriate step increases. Citing Richerson v. Jones, 551

F.2d 918, 925 (3d Cir. 1977), the court denied interest on the back pay award.

In addition to back pay, the court awarded a "cost of living inflation factor" adjustment amounting to $16,231.72 due through July of 1978. In its order the court stated that this award was necessary to assure compensation in "constant dollars" because calculation of plaintiff's back pay award would be based upon federal salary schedules in effect during prior years.

The court also awarded plaintiff $69,015 in attorneys' fees under 42 U.S.C. § 2000e-5(k) for all work performed by counsel on both cases. The Certificate of Counsel in Support of Request for Attorneys' Fees submitted by plaintiff's attorney did not contain a breakdown of how much time was spent on each case.

The Navy appealed from this judgment challenging only the inflation factor adjustment and the attorneys' fees award.

INFLATION FACTOR AWARD

The district court should be reversed on its "cost of living inflation factor" adjustment. It

is important first to identify precisely the nature of this award. The district court sought to make plaintiff whole by placing her in the same position she would have attained had she been hired as an EEO Specialist on April 30, 1973. According to the court's order of October 31, 1978, the court assumed entry into the Specialist position at the GS-7 level, promotion to GS-9 after one year, promotion to GS-11 after a second year, and appropriate step increases to the time of judgment. The calculation of back pay was based on salary schedules in effect during each of those years. The calculation included amounts for promotions, raises, and step increases, all of which presumably already reflected any cost of living adjustment. Over and above this back pay award, the court awarded an additional inflation factor adjustment, which it explained as "necessary to assure compensation in 'constant dollars', because calculation of plaintiff's back pay award (would) be based upon federal salary schedules in effect during prior years."

The doctrine of Sovereign immunity dictates that the United States cannot be sued without its consent. The 1972 amendments to Title VII author-

ize the remedy of back pay for employees of the United States government who are victims of discrimination. See 42 U.S.C. § 2000e-5(g). Although many additional remedies, such as interest on back pay awards, vacation and sick pay adjustments are available to private employees, these remedies are not available to employees of the government because neither the 1972 amendments nor the incorporated provisions of Title VII expressly authorizes them. It is well settled case law that an award of interest on back pay is not available to government employees absent express statutory or contractural authorization. United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951); Fischer v. Adams, 572 F.2d 406, 411 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977).

The inflation factor in this case is very similar to an award of interest in that both types of awards are meant to compensate the victim for the belated receipt of employment pay. The inflation factor adjustment is actually better compensation than an award of interest since the normal 7% interest award would not in these times

make up for the double digit inflation. In essence, the inflation factor adjustment is a disguised interest award, which is not permitted under present law.

The Case of Blake v. Califano, No. 78-2075 (D.C. Cir. Jan. 30, 1980) and Chewning v. Schlesinger, 471 F. Supp. 767, 777 (D.D.C. 1979), held that an inflation factor award added to a back pay award against the government was an indirect award of interest and therefore barred by the doctrine of Sovereign immunity.

The case cited by the district court in support of its inflation factor award, Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828, 834 (N.D. Cal. 1976), is inapposite. It does not address the issue of an inflation factor adjustment but rather is a case on attorneys' fees against a private litigant, and it does not therefore involve the issue of Sovereign immunity.

Appellee relies on a policy statement issued in 1977 by former Attorney General Griffin Bell to all United States Attorneys and agency general counsel. Appellee contends that this

statement supports the general principle that Title VII cases against the United States are to be treated the same as private sector cases. Appellee also relies on the 1972 amendments to Title VII which gave broad new powers to the Civil Service Commission to provide whatever remedies or action are needed to ensure equal employment opportunity in federal employment. 42 U.S.C. § 2000e-16(b). She argues that Congress intended to confer greatly enhanced rights on federal employees to obtain administrative and judicial relief against their federal employer and that the inclusion by courts of an inflaction factor award among the available remedies would further that Congressional intent. These arguments miss the mark. Neither the policy statement of the United States Attorney General nor the broad powers conferred on the Civil Service Commission amount to the express waiver of Sovereign immunity necessary to justify an award of interest.

ATTORNEYS' FEES

We find that the trial court erred by awarding attorneys' fees for both the RIF and the EEO

cases. It is undisputed that the plaintiff prevailed in but one of them. It is a stretch of Congressional intent to hold that there existed such an identity of issues in the two suits that plaintiff's attorneys research and work in each case should be compensated.

Since Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) courts no longer should apply historical equitable powers to justify a fee award in a so-called private attorney general case. Following Alyeska, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) and now such an award is the exercise of a statutory remedy.

Saunders had two separate pieces of litigation which were consolidated for trial purposes. She lost the RIF case. No issue raised in that case was sustained. She prevailed in the EEO case. This is the only case in which it is proper under the mandate of Congress to award a fee. The mere locking together of the two cases under a consolidation order does not turn a lost case into one in which the party may be said to have prevailed.

Appellees reliance on Northcross v. Board of Ed. of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) is misplaced. There it was held that the trial judge erred in cutting the award of fees because the plaintiffs had not prevailed on some issues or parts of issues in the case. Northcross was a single case and the appellate court correctly held it to be improper to cull out and refuse fee award for parts of the total issues raised, which were not persuasive in the reaching of the final decision. "So long as the party has prevailed on the case as a whole, the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith" (P. 636).

On remand the Court should consider only that portion of the claimed fees that relate to the EEO case and deny the remainder.

Reversed.

OPINION OF THE DISTRICT COURT,
July 11, 1978

No. C-73-2241 WHO
No. C-74-1286 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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ETTA B. SAUNDERS,

Plaintiff-Appellee,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants-Appellants.

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. EEO Specialist Case

1. On November 14, 1966, plaintiff was hired at the Naval Air Rework Facility ("NARF"),

Alameda, California, on a temporary appointment, as a Helper, Aircraft Metalsmith, WG-5/1. At that time, plaintiff had approximately three years and seven months of intermittent federal service.

2. On June 14, 1968, plainfiff was promoted to Aircraft Metals Worker, WG-8/1, and was given an appointment as a Career-Conditional employee.

3. Later in 1968, plaintiff also applied for the position of Aircraft Metalsmith, WG-10, which had been annnounced under Announcement No. FS 6-CL. Plaintiff did not receive the promotion which she sought and, on March 26, 1971, plaintiff filed a formal complaint alleging that the failure to promote her was due to discrimination in employment on the grounds of her sex (female) and her race (Black).

4. On February 14, 1972, the Secretary of the Navy notified plaintiff and NARF of his decision that plaintiff had been discriminated against due to her sex with regard to her application to be promoted to the position of Aircraft Metalsmith, WG-10, and that there had been no discrimination against plaintiff on the grounds of her race. The Secretary ordered NARF to grant plaintiff appropriate relief.

5. During the period between the filing of the application for the promotion to the Aircraft Metalsmith, WG-10 position, in March, 1968, and the decision of the Secretary of the Navy in February, 1972, the following events occurred relative to plaintff's employment:

(a) On October 22, 1970, plaintiff obtained Career status in the federal service;

(b) From November 1, 1971, to February 25, 1972, plaintiff was employed in Operations Analysis, 500 Division; and

(c) From June 12, 1972, to August 26, 1972, plaintiff was employed as an on-station Neighborhood Youth Corp Counselor, GS-301-9.

6. On February 18, 1973, plaintiff was promoted to the position of Aircraft Sheetmetal Mechanic, WG-10, from her position as Aircraft Sheetmetal Mechanic, WG-8.

7. On March 19, 1973, plaintiff applied for the position of Equal Employment Opportunity Specialist ("EEO Specialist"), GS 160-9, under Vacancy Announcement No. 73-21. Four vacancies for EEO Specialist at the GS-9 level were sought to be filled by that announcment. Approximately fourteen persons applied for those four positions.

8. The qualification standards for the EEO Specialist position, levels GS-5 through GS-15, are described in the Civil Service Commission Handbook X-113 "Qualification Standards for Positions under the General Schedule" (Exhibit 1015).

9. To qualify as an EEO Specialist, GS-9, an applicant must have four years of "general experience" and one year of "specialized experience in EEO work."

10. Generalized work experience must demonstrate such qualities as awareness of social and economic problems created by discrimination against minorities and women; an ability to meet and deal effectively with persons of both sexes of different ages, races, and economic and educational background; an ability to write clearly; and an ability to collect and assemble facts. Examples of acceptable general experience include participation in community programs designed to promote equality; counseling persons with problems concerning discrimination; participation in programs designed to promote equal opportunity sponsored by educational, religious and social service organizations; and social work, personnel

work, and recreational services for disadvantaged youth. Such experience can be gained in a variety of work settings, paid or voluntary, part or full time.

11. Handbook X-118 also allows credit for education, whereby an academic year at an institution of higher learning is equivalent to nine months of general experience. Pro rata credit is given for education amounting to less than a full academic year.

12. "Specialized experience" must demonstrate such things as knowledge of the causes and effects of discriminatory practices against women and minorities; knowledge of the legal, economic, and social bases for discrimination; an ability to analyze and identify the causes of social and economic problems of the groups to be served, and to make recommendations for solutions to such problems; ability to retain composure in the face of personal criticism and to exercise mature judgment during crisis situations; and an ability to persuade others to adopt and operate effective EEO plans.

13. Plaintiff was furnished with an experience statement questionnaire to be completed and returned for evaluation of her qualifications.

14. Plaintiff's experience questionnaire showed that she had been involved for more than eight years in activities that related directly to equal employment opportunities for minorities and women. She also indicated the extent of her educational background and training which related to the EEO position. Finally, she listed twenty-three persons as references who could verify the extent and quality of her experience.

15. Plaintiff was notified on April 9, 1973, that she had been rated ineligible for the GS-9 EEO Specialist position on the grounds that she lacked five years of verified experience. Shirley Jones, formerly a NARF Personnel Management Consultant, credited plaintiff with only two years, seven-and-a-half months experience, or three years, one-and-a-half months "at the most."

16. On July 16, 1973, plaintiff filed a formal complaint with the Navy claiming she was discriminated against on the grounds of race

and sex and alleging that the determination of ineligibility was improper.

17. When plaintiff filed a grievance with her employer complaining about the rating of "ineligible," the Naval Air Station and the Civil Service Commission conducted investigations to independently calculate plaintiff's experience. Mrs. Gussie Porter, who was asked by Captain Sells of the Naval Air station to look into the matter, concluded that plaintiff could be credited with only three years, ten-and-a-half months experience. The Civil Service Commission also found that plaintiff failed to meet the five years requirement.

18. On May 23, 1974, plaintiff was notified of the Navy's final decision to uphold the determination of ineligibility.

19. On June 18, 1974, plaintiff commenced this action No. C-74-1286 WHO.

20. Only one applicant, Phillip Morris, satisfied the full X-118 standards. He was selected to fill one of the positions.

21. Prior to his selection, Mr. Morris was an electronics engineer, GS-12, step 5, resulting in a salary loss of approximately $4,000.

22. Handbook X-118 contains the following guideline which apparently could have been, but was not, applied to plaintiff's situation: "In evaluating experience, length is of less importance than either demonstrated success in positions of a responsible nature, or the breadth and scope of the pertinent knowledges, skills, and abilities possessed by the applicant and applied in the performance of duties of such positions."

23. Handbook X-118 provides another exception to the five years experience standard: in-service placement. Applicants who lack the five years of experience (and/or substituted education), but who "have actively promoted equality" by participating in EEO-type programs, and who have records indicating a potential for success in equal opportunity work, may be laterally reassigned to EEO Specialist positions.

24. Mrs. Gussie Porter argued to Captain Sells that the aforementioned provision applied to plaintff's situation. Mrs. Porter felt that the quality of plaintiff's three years, ten-and-a-half months experience was so high as to compensate for her lack of five years experience,

and that plaintiff should therefore be appointed. Her advice was not taken.

25. Defendants decided to fill the remaining three GS-9 EEO Specialist positions by using the in-service placement provision. Four applicants, all male, were eligible under these criteria.

26. Eldridge Carrington, Jose Galvan, and Serveriano Garcia, Jr., were ultimately selected.

27. At the time of his selection, Mr. Galvin had only one year, two months experience. His rating record shows the following remarks: "some educ. subst. no other apparent EEO."

28. At the time of selection, Mr. Garcia had one year, three months general credit for education, and 1.6 years credit for experience.

29. Plaintiff was better qualified for the position than either Messrs. Galvan or Garcia, since she was credited with three years, ten-and-a-half months experience. Furthermore, her record indicates not only that her background had prepared her to assume the duties and responsibilities of an EEO Specialist, but also that her experience was of a high quality.

30. Plaintiff served as a reading instructor, counselor, and tester at St. Francis De Sales

and St. Patrick's Schools, Oakland: chairperson, Parents' Advisory Committee on Education, Emery High School; counselor, Community Resources Committee, Upward Bound Program, Mills College; employee's counsel or representative in discrimination complaints, Naval Air Rework Facility, Alameda; employee, Neighborhood Youth Corps office, Naval Air Station; chairperson, Human Relations Committee, Albany; director, Teenagers Social Club, St. Ambrose's Church, Berkeley; member, Parents' Advisory Group, Albany School system. She also took several courses at Laney College and at the U.C. Extension in the area of human relations and labor-management relations.

31. Defendants justify their nonselection of plaintiff under the in-service placement alternative by arguing that her status at all relevant times was WG-10; a transfer from WG-10 to GS-9 would constitute a promotion, as opposed to a lateral transfer, and was therefore not permitted.

32. When defendants made the decision to switch from the full X-118 standards to the in-service placement criteria, they had the opportunity to reannounce the remaining three EEO

Specialist openings at the GS-7 level, so as to increase the pool of eligible applicants.

33. Had the position been reannounced at the GS-7 level, plaintiff would have been eligible for lateral reassignment under the in-service provisions. She was qualified for a EEO Specialist, GS-7 position.

34. Had the position been reannounced at the GS-7 level, defendants would have been obligated under the regulations governing reductions in work force to make plaintiff an offer, to prevent her impending separation.

35. Naval Air Station, Alameda, Instruction (NASALAMEDAINST. 12000.3), Chapter 11, Reduction in Force, at page 11-8 states:

> "When a Group I or II employee is reached for release and cannot be retained in another position within his competitive level, he is entitled to any available position for which he is qualified in another competitive level which has a representative rate equal to or lower than that of the position from which he is being released. If two or more such positions exist, he is entitled to the one with the highest representative rate."

Since plaintiff was reached for release from her WG-10 Sheet Metal Mechanic position and could not be retained in another position within that

competitive level, she would have been entitled to the EEO Specialist position had it been reannounced at the GS-7 level.

36. A NARF publication entitled "narf alameda," dated May, 1976, states:

> "The Civil Service Commission and Department of the Navy regulations provide for use of existing vacancies when RIF occurs. Accordingly, when RIF's are anticipated, it is NARF's policy to freeze internal promotion actions as well as recruitment actions and make the vacancies available for those employees who qualify and are being adversely affected by RIF."

37. Plaintiff was a highly visible and active symbol of equal opportunity at the NARF/NAS. She had been the first female Navy employee to prevail in a discrimination case. She had been active throughout her employment as an EEO Representative for other minority and female employees.

38. Defendants' explanation for not reannouncing the EEO slots at the GS-7 level was that a GS-9 skill level was needed to get the new EEO office functioning properly.

39. However, selection through in-service placement, by definition, involves selection of people who do not meet the formal experience and/or educational requirements for the position

and level involved. Instead, the employer is permitted to look to persons with "potential."

40. Plaintiff's "potential" in the area of EEO was very high; an evaluation of her education, experience, personal characteristics, and abilities, indicates that she had more potential for success at the EEO Specialist position than did several of the men ultimately chosen for the job. She also had more EEO experience than any of the four men selected.

41. Defendants' justification for not reannouncing the EEO Specialist job at GS-7 is pretext. If defendants wanted to acquire the needed skills for their new EEO office, the logical course would have been to select plaintiff for one of the four spots.

42. The Court finds that the real reason defendants chose (1) not to interpret to plaintiff's benefit the Handbook X-118 regulation quoted in Finding of Fact 22, (2) not to reannounce the EEO Specialist openings at the GS-7 level upon invocation of the in-service placement alternative, and (3) to ignore the NARF policy statement quoted in Finding of Fact 36, was to prevent plaintiff from getting the position, and

thereby to force her to leave the Base.

43. The defendants' actions described above were the result of discriminatory and/or retaliatory animus.

B. RIF Case

44. On April 2, 1973, plaintiff was notified that her employment at NARF would be terminated effective June 1, 1973, as a result of a reduction in force ("RIF").

45. Before the 1973 RIF, there were 145 Sheetmetal Mechanic (Aircraft) WG-10 positions at NARF.

46. The RIF abolished 108 of these positions.

47. Plaintiff requested that she be carried on Leave Without Pay status for thirty days.

48. With this thirty-day leave, plaintiff's separation from NARF was effective July 2, 1973.

49. If no appropriate job offer can be made to the particular employee, the employee is notified of his or her impending separation from the federal service.

50. Employees who are subject to RIF may register on three separate priority employment lists. Those lists are:

(a) Navy-Reemployment Priority List (RPL). The RPL is the first list to be considered where vacancies are to be filled. Plaintiff was registered on the RPL for certain positions.

(b) Department of Defense (DOD) Stopper List. The plaintiff was interviewed on May 9, 1973, by Theodore Fernandez, RIF Counselor for IRD, for the purpose of placing plaintiff's name on the DOD Stopper List.

(c) The Civil Service Commission Register of Displaced Employee Program (DEP), which is established pursuant to the provisions of FPM, 335, sub-chapter 3-3e. Plaintiff was registered on the DEP on June 18, 1973.

51. Plaintiff was registered on the RPL for only Sheetmetal Mechanic (A/C) WG-10, Production Controller GS-8, EEO Specialist GS-9, and Production Dispatcher WG-7.

52. Plaintiff registered under the DEP for Sheetmetal Mechanic (A/C) WG-8 and 10, Production Controller GS-8, EEO Specialist GS-7 and 9, Crater and Packer WG-8, and Production Dispatcher WG-7.

53. On the date plaintiff was notified that she was to be RIFed and on the date of her actual termination, plaintiff held the position of Sheet Metal Mechanic, WG 3806-10, with a service computation date of July 2, 1962.

54. Plaintiff's tenure group classification was IB, nonveteran, career employee.

55. An Out-Placement Committee, was set up by NARF to help employees adversely affected by the RIF to find alternate employment in either the public or private sectors.

56. On May 23, 1973, Curtis Turner filed a RIF appeal on behalf of plaintiff with the San Francisco Regional Office of the Civil Service Commission.

57. On August 29, 1973, the Regional Office affirmed the action of defendant NARF in separating the plaintiff.

58. On September 14, 1973, Curtis Turner filed an appeal of the decision of the Regional office with the Board of Appeals and Review of the United States Civil Service Commission in Washington, D.C.

59. On January 28, 1974, the Board of Appeals and Review affirmed the decision of the Regional Office.

60. On November 1, 1973, the plaintiff filed a formal EEO complaint with NAS/NARF alleging discrimination on the basis of race and sex respecting the RIF action.

61. On November 16, 1973, plaintiff was notified of the final decision of the Department of the Navy upholding the RIF action against her and notifying her, among other things, of her right to bring this action.

62. On December 14, 1973, plaintiff commenced this lawsuit, No. C-73-2241 WHO.

63. Plaintiff's name was withdrawn from the DOD list, because plaintiff informed defendants that she did not want to be registered on that list.

64. At no time relevant to this lawsuit did NARF hire any employee from the DOD Stopper List.

65. The RPL applies only when a hiring is done by NARF from outside the facility. RPL limitations do not prevent an agency from filling

a vacant position by promotion of a qualified employee within the agency.

66. None of the persons who were hired by NARF into the positions for which plaintiff was registered on the RPL came from outside the facility.

67. Through the efforts of defendants' Out-Placement Committee, plaintiff was informed of job opportunities. However, plaintiff failed to pursue any of these opportunities.

68. Any placement of NARF employees which may have been made in derogation of plaintiff's pre-RIF and/or post-RIF rights to continued employment resulted from defendants' administrative inefficiency, from defendants' justifiable impression that plaintiff had no interest in the particular positions then available, or from a combination thereof. Mistaken placements, if any occurred, were not the result of discriminatory or retaliatory animus.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of this action pursuant to Section 717(c) of the Equal Employment Opportunity Act of

1972, 42 U.S.C. § 2000e-16(c), amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

2. Plaintiff exhausted all administrative remedies prior to bringing these actions.

3. Plaintiff actively opposed practices made unlawful by Title VII, within the meaning of Section 704(a), by her filing of formal and informal complaints of discrimination in 1971, 1972, and 1973, and her activities as an employee representative in matters of equal employment opportunity.

4. Plaintiff has demonstrated by a preponderance of the evidence that she was rated ineligible for the position of EEO Specialist, GS-9, in retaliation for her opposition to unlawful employment practices and/or for having filed a complaint of unlawful discrimination against the agency.

5. Plaintiff has demonstrated by a preponderance of the evidence that she was rated ineligible for the position of EEO Specialist, GS-9, on the grounds of her sex.

6. Defendant has failed to articulate any legitimate, nondiscriminatory business justifica-

tion for the above-described actions against plaintiff.

7. Plaintiff has failed to demonstrate by a preponderance of the evidence that she was RIFed in retaliation for having opposed alleged discriminatory employment practices and/or having filed a complaint against the agency.

8. Plaintiff has failed to demonstrate by a preponderance of the evidence that she was RIFed on the grounds of her sex (female) or her race (Black).

Counsel for plaintiff shall submit a memorandum suggesting appropriate relief, to be accompanied by a memorandum of points and authorities, by July 14, 1978. Counsel for defendants will submit a memorandum in opposition, if any there be, by July 18, 1978. A hearing on relief will be held Wednesday, July 19, 1978, at 5:00 p.m.

Dated: July 11, 1978.

William H. Orrick
United States District Judge

ORDER OF THE DISTRICT COURT
OCT. 31, 1978

No. C-74-1286 WHO
No. C-73-2241 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

==========

ETTA B. SAUNDERS,

Plaintiff-Appellee,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants-Appellants.

==========

Plaintiff, having demonstrated by a preponderance of the evidence that she was qualified for the position of EEO Specialist GS-7 but that she was rated ineligible on the grounds of her sex, and defendant having failed to articulate any legitimate, nondiscriminatory business justification for such action, and good cause appearing,

IT IS HEREBY ORDERED that:

1. Defendant shall forthwith reinstate plaintiff to the position of EEO Specialist GS-11, step 4. 42 U.S.C. § 2000e-5(g); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977). Plaintiff's seniority shall date back to April 30, 1973, being the time she would have been placed in the position absent discrimination. Polstorff v. Fletcher, 17 FEP Cases 123, 129 (N.D. Ala. 1978). The Court finds that plaintiff would have attained the position of EEO Specialist GS-11 but for the defendants' unlawful employment practices. The Court further finds that the plaintiff has demonstrated that the advancement rate she postulates is fairly typical in the EEO office--having documented two additional instances in which male EEO specialists advanced at such a rate. The Navy has not borne its burden of showing, by a preponderance, that even absent discrimination plaintiff's qualifications were such that she would not have been promoted to the GS-11 position.

2. Defendant shall forthwith award back pay to plaintiff computed as follows:

(a) Assume entry into the EEO Specialist position at the GS-7 level, promotion to GS-9

after one year, promotion to GS-11 after a second year, and appropriate step increases to date, deducting from the total back pay the amount of severance pay. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). Plaintiff should be credited with the amount of sick leave and annual leave which she had accumulated at the time of her termination in 1973. This result, which constitutes an attempt to implement the "make whole" remedy of the Act, makes the quite reasonable assumption that plaintiff, had she been employed at NARF during the period of her separation, would have experienced her previous rate of illness and availed herself of annual leave as it became due her.

(b) There will be no award of interest. Richerson v. Jones, 551 F.2d 918, 925 (3d Cir. 1977).

(c) An inflation factor, calculated according to the United States Department of Labor average cost-of-living data for the years in question, shall be included. This is necessary to assure compensation in "constant dollars," because calculation of plaintiff's back pay award will be based upon federal salary schedules in effect

during prior years. See Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828, 834 (N.D. Cal. 1976).

(d) There will be no award of lost overtime pay, because such damages are too speculative.

(e) Unemployment compensation received by plaintiff will be deducted from the total back pay award. The Court declines to apply the collateral source rule here; a back pay award is not punitive in nature, but is compensatory, intended merely to make the plaintiff whole from the effects of unlawful discrimination. See EEOC v. Enterprise Association, 542 F.2d 579, 591-92 (2d Cir. 1976).

(f) The award shall not be reduced for amounts "earnable with reasonable diligence." 42 U.S.C. § 2000e-5(g). The Court finds that plaintiff, although she was unable to secure alternative employment, did exercise reasonable diligence in the pursuit thereof. The record shows that she was registered on several employment eligibility lists, that she sought work as a sheetmetal mechanic at several Navy installations and with at least one private employer in the San Francisco Bay area, and that she applied for employment at a local EEOC office. The Court finds these efforts

clearly sufficient to meet the mitigation requirements imposed by the Act, See Inda v. United Air Lines, Inc., 405 F. Supp. 426 (N.D. Cal. 1975), aff'd, 16 FEP Cases 251 (9th Cir. 1977).

3. The record is hereby augmented by admitting into evidence Plaintiff's Exhibit 64, submitted September 8, 1978.

4. Plaintiff will prepare a judgment in form approved by the defendant to be lodged with the Court on or before November 15, 1978.

Dated: October 31, 1978.

William H. Orrick
United States District Judge

ORDER OF THE DISTRICT COURT
Dec. 12, 1978

No. C-73-2241 WHO
No. C-74-1286 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

==========

ETTA B. SAUNDERS,

Plaintiff,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants.

==========

ORDER

The Court, having considered plaintiff's proposed form of judgment, plaintiff's proposed amendments to the Court's Order of October 31, 1978, and defendants' objections thereto, and good cause appearing,

IT IS HEREBY ORDERED that:

1. The Order of this Court entered October 31, 1978, shall be amended as follows: On page 3, following paragraph 2(f), there shall be inserted the following new paragraph:

> "(g) Plaintiff may reinstate her retirement benefits for part or all of the period prior to January 2, 1978, by contributing appropriate amounts, not to include any contribution by plaintiff as interest, to the retirement system for each period of employment for which she has no contribution to her credit, and for which she wishes to have retirement credit."

2. There shall be no award of injunctive relief. Plaintiff's interest in remaining free from future acts of discrimination is adequately protected by the extensive injunctive relief entered pursuant to the Consent Decree in Saunders v. Naval Air Rework Facility, No. C-74-0520 WHO.

3. Plaintiff shall prepare a proposed form of judgment which shall conform to the terms of the October 31, 1978, Order, as amended herein. Adjustment of sick leave and annual leave shall be as stated in the October 31 Order, and there shall be no cash award option. Retroactive seniority

shall correspond to the job progression ladders set forth in plaintiff's Exhibit 64.

4. The Court finds plaintiff to be a prevailing party within the terms of Title VII, 42 U.S.C. § 2000e-5(k), and shall award a reasonable attorney's fee. Plaintiff shall submit a certificate of counsel containing sufficient information to enable the Court to consider an appropriate award in light of the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

Plaintiff shall file and serve upon defendants the required materials no later than December 22, 1978, to which defendants shall respond no later than December 29, 1978, whereupon the matter shall be deemed submitted.

Dated: December 12, 1978.

William H. Orrick
United States District Judge

ORDER OF THE DISTRICT COURT
Jan. 25, 1979

No. C-73-2241 WHO
No. C-74-1286 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

==========

ETTA B. SAUNDERS,

Plaintiff,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants.

==========

JUDGMENT

This action, having been tried before this Court, sitting without a jury, on March 27 to 29, 1978, and this Court having entered its Findings of Fact and Conclusions of Law on July 11, 1978, and its Order as to appropriate relief on October 31, 1978,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. Defendants shall, not later than February 5, 1979, reinstate plaintiff to the position of EEO Specialist, GS-11, Step 4, with seniority dating back to April 30, 1973. Such retroactive seniority shall correspond to the job progression ladders set forth in plaintiff's Exhibit 64.

2. Defendants shall award back pay to plaintiff, computed pursuant to the Federal GS pay schedule, with cost of living increases, deducting therefrom the amount of plaintiff's severance pay ($4,619.11), and plaintiff's compensation benefits ($1,620.00). The amount of plaintiff's back pay from date of termination through February 5, 1979, is $92,955.92; the additional amount due as a cost of living inflation factor through July, 1978, is $16,231.72. On or before the 61st day following entry of this Judgment, defendants shall pay to plaintiff the adjusted back-pay award, as indicated above, in the amount of $102,948.53. In the event of an appeal, the amount paid as an inflation factor shall be recomputed according to the most current

Department of Labor cost of living index figure available at the time of payment.

3. The defendants shall credit plaintiff with any sick leave and annual leave which plaintiff had accrued at the time of her separation from the Federal Service on April 30, 1973. This result, which constitutes an attempt to implement the "make whole" remedy of the Act, makes the quite reasonable assumption that plaintiff, had she been employed at NARF during the period of her separation, would have experienced her previous rate of illness and availed herself of annual leave as it became due her.

4. Plaintiff may reinstate her retirement benefits for part of all of the period prior to February 5, 1979, by contributing appropriate amounts, not to include any contribution by plaintiff as interest, to the retirement system for each period of employment for which she has no contribution to her credit, and for which she wishes to have retirement credit.

5. The Court finds plaintiff to be a prevailing party within the terms of Title VII, 42 U.S.C. § 2000e-5(k), and shall award reasonable attorneys' fees and costs.

Dated: January 25, 1979.

William H. Orrick
United States District Judge

ORDER OF THE DISTRICT COURT
Jan. 25, 1979,
on Attorneys' Fees

No. C-73-2241 WHO
No. C-74-1286 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

==========

ETTA B. SAUNDERS,

Plaintiff,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants.

==========

ORDER

The Court having reviewed the entire record of proceedings in this case, including the certificates, affidavits and memoranda submitted by the parties pursuant to plaintiff's application for an award of attorneys' fees, and having

considered this material in light of the criteria set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (See, Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. den., 425 U.S. 951 (1976), [1] the Court finds the facts to be as follows:

1. In its Order of December 13, 1978, the Court found plaintiff to be a prevailing party within the terms of Title VII, 42 U.S.C. § 2000e-5(k), and thereby entitled to an award of reasonable attorneys' fees. Counsel have since complied

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1. The Court's Order of December 13, 1978, directed counsel to submit material necessary for consideration of this issue under the criteria in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Defendants now suggest that the recent decision in Copeland v. Marshall, No. 77-1351 (D.C. Cir. Oct. 30, 1978), should instead guide the Court's disposition of this matter. However, the "cost-plus" formula of Copeland, interesting though it may be, has not been approved by this Circuit. Furthermore, defendants argue that because they cannot at this time take a position with respect to Copeland, the Court should stay any consideration of fees. Such a result would be grossly unfair to counsel for plaintiff, who have patiently litigated this matter since 1973.

with the Court's instruction to submit certificates containing sufficient information from which a reasonable award can be determined.

2. The issues in this employment discrimination action, although not truly novel, were indeed complex, both legally and factually. The plethora of federal regulations involved, and their various impacts upon plaintiff and other similarly-situated employees, rendered the case exceedingly difficult. The differing circumstances surrounding the employment of plaintiff and other Navy employees added further complexity. Finally, the several months necessary to enable counsel and the Court to fashion appropriate relief has made apparent the difficulty in that area of the matter as well.

3. Counsel's efforts in this litigation produced an extremely beneficial result for the plaintiff. Mrs. Saunders obtained reinstatement, an award of back pay, and the variety of benefits appurtenant thereto. In addition, her success in this action serves to vindicate the important national goals and policies embodied in Title VII. See, Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d at 716. In this regard, the Court

finds it irrelevant that plaintiff did not "prevail" on each issue tendered in the case. The Court is not required to scrutinize every element of plaintiff's litigation strategy; therefore, unless claims are "clearly meritless," work performed in connection therewith may be compensated despite the result. Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), aff'd 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 46 U.S.L.W. 4545 (1978); Richardson v. Civil Service Commission, 17 FEP Cases 157, 158 (S.D. N.Y. 1978).

4. The risk undertaken by counsel in prosecuting this action was substantial. Since 1973, counsel for the plaintiff have devoted considerable efforts to this litigation with no assurance of ultimate success and without any fee commitment from the client. The Court's insistence upon fixed trial dates--some of which were continued due to priority criminal matters--precluded counsel from accepting trial-related employment involving conflicting appearances.

5. The litigation was prosecuted by able, skilled counsel whose representaion was of the highest quality. The Court need not look beyond

the record of this case to appreciate the ability of all counsel involved. Mr. Moore's long experience in employment discrimination matters was reflected not only in his pleadings, memoranda and court appearances, but also in his skillful handling of negotiations and case management. He was greatly benefited by the assistance of his associate, Ms. Seville, who, though less experienced, is an able and competent attorney.

6. In light of the complexity of the case, its duration, and the result achieved, the total hours claimed to have been spent on the litigation appear to the Court to be reasonable. The affidavits of counsel set forth in detail the various activities involved and the time attributable to each. Mr. Moore claims a total of 457 hours, Ms. Seville 445 hours, and Ms. Viveros, a paralegal who assisted in the preparation of the case, 120 hours. The Court finds little duplication in the efforts expended, and no attempt to inflate these totals beyond the actual time spent.

7. The Court finds the hourly rates requested, although not completely unrealistic, somewhat higher than appropriate for some of the activities involved. See Richardson v. Civil

Service Commission, supra; Williams v. Saxbe, 17 FEP Cases 1657, 1661 (D.D.C. 1976). Mr. Moore seeks an hourly rate of $100, for all activities,[2/] even though much of his time necessarily involved review of pleadings, memoranda and other documents prepared by others. Ms. Seville, who has only recently completed her third year of law practice, seeks compensation at the rate of $75 per hour. The time spent by Ms. Viveros, a paralegal assistant, has been computed by counsel at $30 per hour.

Based upon all of the findings set forth above, the Court concludes a reasonable award of attorneys' fees for the services of Mr. Moore and his associates to be $65,000. In addition, costs of $3,000, pursuant to counsel's affidavit, shall be allowed.

The Court has also examined the request of Mr. John Erickson for attorney's fees in connection with his participation in these proceedings. In light of the factors described above, and

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2/ Defendants do not object to compensation at a rate of $100 per hour for Mr. Moore's trial advocacy, but suggest that a lower figure is more appropriate for other activities.

particularly the court's awareness of the high quality of Mr. Erickson's work, his request for $675 is a reasonable one. In addition, costs of $340, contributed by the NAACP Defense and Education Fund, Inc., shall be allowed.

IT IS HEREBY ORDERED that defendants shall forthwith reimburse plaintiff for reasonable attorneys' fees in accordance with this Order.

Dated: January 25, 1979.

William H. Orrick
United States District Judge

ORDER OF THE DISTRICT COURT,
March 16, 1979

No. C-73-2241 WHO
No. C-74-1286 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

==========

ETTA B. SAUNDERS,

Plaintiff,

v.

WILLIAM GRAHAM CLAYTOR, JR.,
Secretary of the Navy, et al.,

Defendants.

==========

ORDER

The above and foregoing civil actions, this date, coming on for hearing on defendants' motion for new trial, pursuant to Rule 59, FRCP, and to amend findings, pursuant to Rule 52(b), FRCP, the parties appearing through their respec-

tive counsel of record, briefs and arguments having been considered, and the matter thereafter duly submitted, the premises considered, IT IS HEREBY ORDERED, ADJUDGED and DECREED,

That, defendants' motion for new trial on all grounds be and is hereby denied; and

That defendants' motion to amend findings on all grounds be and is hereby denied.

Dated: March 16, 1979.

William H. Orrick Jr.
USDJ

MEMORANDUM FOR UNITED STATES ATTORNEYS
AND AGENCY GENERAL COUNSELS

Re: Title VII Litigation

In 1972, as additional evidence of our Nation's determination to guarantee equal rights to all citizens, Congress amended Title VII of the Civil Rights Act of 1964 to provide Federal employees and applicants for Federal employment with judicially enforceable equal employment rights. The Department of Justice, of course, has an important role in the affirmative enforcement of rights under the Act, in both the private and public sectors. To effectively discharge those responsibilities, we must ensure that the Department of Justice conducts its representational functions as defense attorneys for agencies in suits under the Act in a way that will be supportive of and consistent with the Department's broader obligations to enforce equal opportunity laws. This memorandum is issued as part of what will be a continuing effort by the Department to this end.

Congress, in amending Title VII, has conferred upon Federal employees and applicants the same substantive right to be free from discrimination on the basis of race, color, sex, religion, and national origin, and the same procedural rights to judicial enforcement as it has conferred upon employees and applicants in private industry and in state and local governments. Morton v. Mancari, 417 U.S. 535 (1974); Chandler v. Roudebush, 425 U.S. 840 (1976). And, as a matter of policy, the Federal Government should be willing to assume for its own agencies no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon private and state and local government employers.

In furtherance of this policy, the Department, whenever possible, will take the same position in interpreting Title VII in defense of Federal employee cases as it has taken and will take in private or state and local government employee cases. For example, where Federal employees and applicants meet the

criteria of Rule 23 of the Federal Rules of Civil Procedure, they are also entitled to the same class rights as are private sector employees. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 (1975). Further, the Department of Justice has acquiesced in the recent rulings of the Fifth and Sixth Circuit Courts of Appeals that it is unnecessary for unnamed class members to exhaust their administrative remedies as a prerequisite to class membership. Eastland v. TVA, 553 F.2d 364 (5th Cir. 1977); Williams v. TVA, ___F.2d___ (6th Cir. 1977). Consequently, we will no longer maintain that each class member in a Title VII suit must have exhausted his or her administrative remedy.

In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. See Copeland v. Usery, 13 EPD ¶11,434 (D.D.C. 1976); Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976); Sperling v. United States, 515 F.2d 465 (3d Cir. 1975). Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases.

The Department, in other respects, will also attempt to promote the underlying purpose of Title VII. For example, the 1972 amendments to Title VII do not give the Government a right to file a civil action challenging an agency finding of discrimination. Accordingly, to avoid any appearance on the Government's part of unfairly hindering Title VII law suits, the Government will not attempt to contest a final agency or Civil Service Commission finding of discrimination by seeking a trial de novo in those cases where an employee who has been successful in proving his or her claim before either the agency or the Commission files a civil action seeking only to expand upon the remedy proposed by such final decision.

The policy set forth above does not reflect, and should not be interpreted as reflecting, any unwillingness on the part of the Department to vigorously defend, on the merits, claims of discrimination against Federal agencies where appropriate. It reflects only a concern that enforcement of the equal opportunity laws as to all employees be uniform and consistent.

In addition to the areas discussed above, the Department of Justice is now undertaking a review of the consistency of other legal positions advanced by the Civil Division in defending Title VII cases with those advocated by the Civil Rights Division in prosecuting Title VII cases. The objective of this review is to ensure that, insofar as possible, they will be consistent, irrespective of the Department's role as either plaintiff or defendant under Title VII. As a part of this review, "the Equal Employment Opportunity Cases" section of the Civil Division Practice Manual (§3-37), which contains the Department's position on the defense of Title VII actions brought against the Federal Government, is being revised. When this revision is completed, the new section of the Civil Division Practice Manual will be distributed to all United States Attorneys' Offices and will replace the present section. Each office should rely on the revised section of the Manual for guidance on legal arguments to be made in Title VII actions. In order to ensure consistency, any legal arguments which are not treated in the Manual should be referred to the Civil Division for review prior to their being advocated to the court.

This policy statement has been achieved through the cooperation of Assistant Attorney General Barbara Babcock of the Civil Division who is responsible for the defense of these Federal employee cases, and Assistant Attorney General Drew Days of the Civil Rights Division who is my principal adviser on civil rights matters. They and their Divisions will continue to work closely together to assure that this policy is effectively implemented.

GRIFFIN B. BELL

August 31, 1977

DOJ-1977-09

No. 80-995

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ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ETTA B. SAUNDERS, PETITIONER

v.

WILLIAM GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-995

ETTA B. SAUNDERS, PETITIONER

v.

WILLIAM GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether Congress has waived the sovereign immunity of the United States in order to permit the addition of a cost of living "inflation factor" to a back pay award to a federal employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c).

2. Whether the court of appeals properly reversed the district court's award of attorneys' fees for all time spent on two consolidated cases where, as the district court itself held, petitioner did not prevail in one of the two cases.

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STATEMENT

1. Petitioner was a civilian employee of the United States Department of the Navy in Alameda, California, from 1966 until 1973, when she was terminated as a result of a reduction in force (RIF) (Pet. App. 12a-14a, 27a-28a). She was employed as an aircraft metalsmith (*id.* at 13a). In 1972, the Secretary determined that she had been denied a promotion in her job on the basis of her sex, and she was given appropriate relief (*ibid.*). In 1973, petitioner applied for a vacant position as an Equal Employment Opportunity (EEO) Specialist (*id.* at 14a). Had she been chosen for the job, she would not have been terminated in the RIF (*id.* at 22a).

Petitioner filed two separate lawsuits against the government under Title VII of the Civil Rights Act of 1964, one challenging the RIF and the other challenging the Navy's failure to select her for the EEO position (Pet. App. 2a). In each suit, petitioner claimed that the government's action was based on unlawful discrimination on the basis of race or sex (*id.* at 2a-4a). After trial of the consolidated cases, the district court found that petitioner "failed to demonstrate by a preponderance of the evidence that she was RIFed on the grounds of her sex (female) or her race (Black)" (*id.* at 31a). However, in petitioner's separate action for denial of the EEO position, the district court found that she was denied that job as a "result of discriminatory and/or retaliatory animus" (*id.* at 25a). The district court awarded petitioner reinstatement with retroactive seniority and placement in the grade that the court determined she would have attained absent the discrimination (*id.* at 33a). Back pay was awarded, calculated on the basis of the promotions and step increases that the district court determined petitioner would have received (*id.* at 33a-34a). The government did not appeal the finding of liability or award of back pay relating to petitioner's failure to obtain the EEO position, and petitioner did not appeal from the judgment against her in the RIF action.

2. The district court declined to award interest on petitioner's back pay award (Pet. App. 34a), relying on *Richerson* v. *Jones,* 551 F. 2d 918, 925 (3d Cir. 1977), which held that sovereign immunity bars the award of interest on a back pay award against the federal government under Title VII. However, the district court added "a cost of living inflation factor" to the back pay award, based upon the average cost of living statistics of the United States Department of Labor (Pet. App. 34a-35a, 41a-42a).

Attorney's fees of $65,675.00 were awarded by the district court for time spent by counsel in petitioner's EEO action, on which she prevailed, and on her RIF action, in which the government prevailed (Pet. App. 44a-50a). The court stated that it was "irrelevant that [petitioner] did not 'prevail' on each issue tendered in the case" (*id.* at 47a).

3. The court of appeals reversed the award of the cost of living inflation factor, finding it barred by sovereign immunity. In the court's view, the inflation factor "is very similar to an award of interest in that both types of awards are meant to compensate the victim for the belated receipt of employment pay" (Pet. App. 7a). Because an award of interest "is not permitted under present law," the court found the award of the inflation factor adjustment equally prohibited, because it is "a disguised interest award" (*id.* at 8a).

The court of appeals also held that the district court erred in awarding attorney's fees for time spent on petitioner's RIF suit, stating (Pet. App. 10a):

> [Petitioner] had two separate pieces of litigation which were consolidated for trial purposes. She lost the RIF case. No issue raised in that case was sustained. She prevailed in the EEO case. This is the only case in which it is proper under the mandate of Congress to award a fee. The mere locking together of the two cases

under a consolidation order does not turn a lost case into one in which the party may be said to have prevailed.

The court remanded for a determination of a proper attorney's fee award based solely on the EEO case (Pet. App. 11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the courts of appeals. Further review by this Court therefore is not warranted.

1. Sovereign immunity precludes an award of monetary relief against the United States without its consent. *United States* v. *Testan*, 424 U.S. 392 (1976); *United States* v. *Sherwood*, 312 U.S. 584 (1941). Accordingly, it is axiomatic that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980). Accord, *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *N. Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947); *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). Mere general language is not sufficient to permit an award of interest. "The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States* v. *N. Y. Rayon Importing Co.*, *supra*, 329 U.S. at 659; *United States* v. *Goltra*, 312 U.S. 203, 207 (1941).

Title VII makes no express provision for payment of interest on back pay awards to federal employees, and the courts of appeals uniformly have denied interest in such cases even though interest may be available to private

employees under Title VII. *Blake* v. *Califano*, 626 F. 2d 891 (D.C. Cir. 1980); *de Weever* v. *United States*, 618 F. 2d 685 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F. 2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F. 2d 918, 925 (3d Cir. 1977).[1] Even the district court in the instant case agreed that interest could not be awarded (Pet. App. 34a, citing *Richerson* v. *Jones, supra*).

The court of appeals correctly held that the inflation factor adjustment that the district court awarded "is a disguised interest award, which is not permitted under present law" (Pet. App. 8a). This ruling is consistent with *Blake* v. *Califano, supra*, which likewise held that an inflation factor is barred by sovereign immunity. 626 F. 2d at 895.[2]

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[1]For the same reason, interest has been denied on back pay awards against the government under the Back Pay Act, 5 U.S.C. 5596 (b)(1). *Fitzgerald* v. *Staats*, 578 F. 2d 435 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978); *Van Winkle* v. *McLucas*, 537 F. 2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

[2]Contrary to petitioner's assertion (Pet. 13-20), there is no conflict between the decision in the instant case and any decision of this Court. The Court in *Brown* v. *GSA*, 425 U.S. 820 (1976), simply held that Title VII is the exclusive remedy for employment discrimination claims of federal employees. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), the Court held that Congress intended the courts to hear Title VII claims of federal employees *de novo*. An "inflation factor" is certainly not mandated by *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), as petitioner claims (Pet. 19-20). That case involved private parties, not the federal government, and simply held that the private plaintiffs were entitled to recover back pay even though they did not request that relief from the district court until five years after their complaint was originally filed. Similarly, *Wicker* v. *Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867), relied upon by petitioner (Pet. 20), has nothing to do with the issues presented here. Only private parties were involved, and the Court merely held that the plaintiff was entitled to interest and costs as damages for breach of contract. Finally, to the extent that *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974), is relevant, it supports the government. Although the Court stated that "*[i]n general*, it may be said that the *substantive* anti-discrimination law * * * applie[s] to the Federal Government * * *" (emphasis added), the holding was that Title VII and its legislative history did not reveal a congressional intent to repeal the statutory preference for hiring Indians at the Bureau of Indian

Moreover, like the appellant in *Blake* v. *Califano* (see 626 F. 2d at 895), petitioner has not cited a single case in which an inflation factor has been added to a back pay award even in an action against a *private* employer under Title VII, and we are not aware of any such case.[3] Thus, further review on this issue is unwarranted.

2. Congress provided that petitioner is entitled to recover attorney's fees against the government under Title VII only if she has substantially prevailed. 42 U.S.C. 2000e-5(k), 2000e-16(d); see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). In this case, the court of appeals correctly held that petitioner is not entitled to an award of attorney's fees for work done on a case that she lost.

Petitioner filed two different lawsuits challenging two separate personnel actions that incidentally occurred at approximately the same time. We do not dispute that petitioner is entitled to attorney's fees for all of counsel's efforts reasonably related to prosecution of her suit challenging the denial of the EEO Specialist job, the cause of action in which she prevailed. Nor do we suggest that, because petitioner did not prevail on every theory advanced in support

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Affairs. Moreover, the present case concerns an issue of monetary relief, in which the federal government stands in a different position because of established principles of sovereign immunity, not a question of substantive Title VII law.

[3]Petitioner asserts that "the government has routinely * * * received[] adjustments to back pay to compensate for the effects of inflation * * *" (Pet. 19), citing *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 940 (10th Cir. 1979), and *EEOC* v. *Pacific Press Publishing Ass'n*, 482 F. Supp. 1291 (N.D. Cal. 1979). However, those cases involved relief against private defendants, not the government, and, in any event, the so-called "adjustments to back pay" were in fact "interest," not inflation factors *per se*. Indeed, the court in *EEOC* v. *Pacific Press*, *supra*, specifically rejected the request for an " 'inflation factor' based upon the Bureau of Labor Statistics Consumer Price Index * * *" (482 F. Supp. at 1319), precisely the relief petitioner seeks here.

of her challenge to denial of the EEO position, the fee award necessarily should be reduced.[4]

We submit only that petitioner cannot be compensated for counsel's unsuccessful efforts to establish that she was the victim of discrimination when she was included among 108 other employees who were RIFed by the Navy and that she cannot avoid this result merely because she joined this cause of action with a successful challenge to a distinct personnel action by the Navy.

Petitioner states that her "suspicion that there was a relationship between the RIF and the promotion denial proved correct" (Pet. 32). That assertion is refuted by the unchallenged decision of the district court that petitioner "failed to demonstrate by a preponderance of the evidence that she was RIFed on the grounds of her sex (female) or her race (Black)" or "in retaliation for having opposed alleged discriminatory employment practices and/or having filed a complaint against the agency" (Pet. App. 31a).

Thus, the court of appeals correctly implemented the congressional mandate that attorney's fees be awarded against the government only in a case in which the complainant has prevailed. Because petitioner lost her RIF case

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[4]For example, the district court found that petitioner was denied the EEO position she sought on the basis of her sex and in retaliation for her EEO activities and her earlier successful administrative discrimination claim (Pet. App. 30a). The court did not find any discrimination on the basis of race, even though this was alleged in petitioner's complaint (*id.* at 13a). We do not contend that counsel's compensable time must be reduced for that reason. Moreover, to the extent that there were issues of law and fact common to petitioner's distinct causes of action, petitioner may well be able to recover attorney's fees for the time her lawyer devoted to these issues in connection with the action relating to the EEO Specialist position, on which she prevailed. Only time spent on matters relating solely to the RIF case should be uncompensated.

against the government, the award of fees for counsel's work related to it has not been authorized by Congress.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[5]Because the present case involved challenges to distinct personnel actions by the Navy, it is unlike *Northcross* v. *Board of Education*, 611 F. 2d 624 (6th Cir. 1979), upon which petitioner relies (Pet. 35-36) in suggesting a conflict among the circuits. As the court below observed (Pet. App. 11a), "*Northcross* was a single case and the appellate court correctly held it to be improper to cull out and refuse a fee award for parts of the total issues raised, which were not persuasive in the reaching of the final decision."